IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 57600/2017

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: ***NO***

Date: 14 August 2024

Signature:

In the matter between:

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE Applicant

And

DENEL VEHICLE SYSTEMS (PTY) LTD Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] This is an application by the Commissioner of the South African Revenue Service ("SARS") for the rescission of a judgment granted in default on 14 May 2018 by His Lordship the Honourable Justice Wanless.

Applicant's submissions:

[2] Denel sought and obtained the judgment (sought to be rescinded), in circumstances where SARS had entered an appearance to defend but did not receive a notice enrolling the matter for hearing. SARS was accordingly not aware that Denel's application had been enrolled for hearing.

[3] The application is brought in terms of the common law as well as Rule 31(2)(b) and Rule 42(1)(a) of the Uniform Rules of Court.

[4] The orders that were granted against SARS included an order directing SARS to make payment to Denel in respect of claims for drawback in terms of the Customs and Excise Act, 91 of 1964 ("the Act"), in the amount of R13 million as follows:

4.1 under claim numbers 1178, 1171, 1179, 1172, 1164 and 1180 in the amount of R6,776,846.71; and

4.2 a further claim for drawback with claim numbers 1181, 1173 and 1174 in the amount of R6,453,474.67

[5] Rescission is sought inter *alia* on the basis that the default judgment was granted in circumstances where SARS was not in wilful default and where SARS has a *bona fide* defence to the claims made by Denel. The matter is principally one of interpretation of the Act and SARS construction thereof in justification of its refusal to grant Denel the drawbacks sought is neither insensible nor untenable. On the contrary, SARS submits that it is the most reasonable interpretation to adopt.

[6] Judgment was sought and obtained in circumstances where SARS had entered an appearance to defend but did not receive a notice enrolling the matter for hearing. SARS was accordingly not aware that Denel's application had been enrolled for hearing.

[7] At all material times relevant to the obtaining of the default judgment, Denel's attorneys were aware that SARS was opposed to the relief sought by it and that it had not, at any time, withdrawn and/or abandoned its opposition.

Respondent's submissions:

[8] The notice of enrolment was duly served via sheriff on the state attorney's office representing SARS. The hearing date was additionally communicated to the state attorney via email.

[9] SARS filed an intention to oppose the application, however, failed to file the record by the time frames it undertook to do so, and SARS directly requested an extension to 16 February 2018 to file its answering affidavit which it then also failed to deliver.

Applicant's explanation for the default:

[10] SARS's explanation for its failure to attend court on 14 May 2018 relate to the delivery of the notice of set down by Denel's attorneys which SARS states seems to have occurred on 14 February 2018.

[11] According to SARS, Denel's attorneys were already aware of the legal representation challenges facing SARS when the matter was enrolled and the notice of set down was issued and delivered to the State Attorney Pretoria. That is because they were informed as early as 16 January 2018 that the state attorney who was handling the matter had resigned, and that SARS still needed to ascertain who at the State Attorney's office was going to deal with the matter. In addition, Denel's attorneys were told that Ms Madileng at SARS had taken over the matter because the SARS official previously dealing with the matter had likewise resigned.[1]

[12] With the knowledge of the abovementioned developments, proceeded to effect service of the notice of set down on the Office of the State Attorney Pretoria, with specific reference to the e-mail address of Tebogo Ramahlaha who it knew had resigned, thereby creating the impression that the notice of set down was intended for his attention.

[13] This service was made under the reference number Z92, that was specifically for Tebogo Ramahlaha. But Mr Ramahlala had already left the employ of the State Attorney by that time and unfortunately the State Attorney had not as yet appointed a replacement to attend to this matter on behalf of SARS.

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[1] Founding affidavit annexure "R4".

[14] It came to pass that the notice of set down did not come to the attention of SARS until after the judgment had been granted.

[15] SARS had at all material times prior to Denel obtaining the judgment by default made its intention to defend the matter. It had even requested an indulgence on 16 January 2018 from Denel's attorneys to file its answering affidavit. This was a clear indication of its intention to oppose the main application.

[16] Denel has secured an undue advantage of the lacuna created as a result of Mr Ramahlaha's resignation from the office of the State Attorney.

[17] SARS was not wilful in its conduct. Ms Madileng who was the new SARS official dealing with the matter continued to follow up with counsel as to the progress made on finalising the answering affidavit. A draft was only received from counsel on 5 April 2018.

[18] Although the notice of set down came to the attention of Mr Ramathape at the State Attorney on 19 April 2018 it was not forwarded to any one at SARS and Ms Madileng was thus unaware of its existence. Although it was sent to SARS counsel, he was on vacation at the time and therefore it did not come to his attention at the time either.

[19] When Denel's practice note was filed, it came to Mr Ramathape's notice only on 11 May 2018. That was because the reference cited on the filing sheet was that of Mr Ramahlala who had long resigned. Although the practice note was forwarded to SARS's counsel, it only came to his attention on 14 of May 2018 and then he too, did not realize that the matter had been set down on the unopposed roll.

[20] It was submitted on behalf of SARS that it should not be penalized for the confusion that resulted in the State Attorney's office or because counsel had

not appreciated that the main application had been set down on the unopposed roll.

Denel's response:

[21] The Denel counters this and alleges that SARS was in wilful default on the basis of the fact that:

21.1 SARS had failed to deliver the review record.

21.2 As at 27 February 2018, one Mr Mashabela of the Office of the State Attorney Pretoria, obtained knowledge that the main application had been enrolled for hearing on 14 May 2018.

21.3 On 16 January 2018 (at 02h49pm), Denel's attorneys had responded to an earlier email from Ms Madileng (sent on 16 January 2018 at 11h13am) to which Denel's attorneys never received any further responses. On this basis Denel seeks to impugn SARS's evidence that it was unaware of the main application being set down for 14 May 2018 *("criticism on the basis of correspondence of 16 January 2018").*

[22] SARS responded to this criticism for the non-delivery of the review record as being unjustified, considering:

22.1 that it had acted on advice by counsel that it would not be required to deliver a record because the proceedings were truly appeal proceedings and not review proceedings. Whether this advice is correct or not is irrelevant. What is of significance, it was submitted, is that following this advice, SARS commenced with the preparation of an answering affidavit and sought an extension of time for the delivery of such affidavit;

22.2 that in any event, a party alleging non-delivery of the review record would be entitled to compel such delivery. Denel made no such application;

22.3 that instead, Denel relied on SARS non-delivery of the record as a basis for surmising that SARS no longer had any intention to oppose the main application. But that view could never have been genuinely held because on 16 January 2018 SARS requested an extension for the delivery of its answering affidavit.

[23] In so far as the second criticism imputing knowledge on Mr Mashabela is concerned, it is apparent from the relevant correspondence sought to be relied upon by Denel that Mr Mashabela had approached Denel's attorneys on behalf of a ITAC and not on behalf of SARS.

[24] As regards the criticism based on correspondence between the parties, SARS submitted that the communication had been initiated by Ms Madileng of the State Attorney at 11h13am in an effort to obtain an extension until 16 February 2018 in order to file SARS's answering affidavit. Instead of dealing with the extension request, Ms Debbie Barnard merely wanted to know when the record would be filed. As matters stand, it is a historical fact that SARS did not file its answering affidavit.

B. THE LEGAL PROVISIONS:

[25] Uniform Rule 31(2)(b) provides as follows:

"(b) A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

[26] The requirements for an party seeking to rescind a judgment to succeed in terms of Rule 31(2)(b) and the common law were stated by the Supreme

Court of Appeal in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape).*[2] The applicant must:

26.1 provide a reasonable explanation for his/her default;

26.2 show that his application is made *bona fide*; and

26.3 show that on the merits he has a *bona fide* defence which prima facie carries some prospects of success.

[27] Rule 42(1)(a) is resorted to *"to correct expeditiously an obviously wrong judgment or order"*[3]

[28] In *Kgomo v Standard Bank*[4] Dodson AJ held that once it is shown that an order was erroneously sought or granted, the court should without further inquiry rescind or vary the order, it is not necessary for the applicant to show good cause for the rule to apply or absence of wilful default.

[29] In *Pugin v Pugin*,[5] Trollip J, gave effect to the common law principle that a person who has entered an appearance to defend cannot (ideally) be condemned without being heard.

C.CONCLUSION

[30] Having considered the above submissions, I am persuaded that SARS has made a substantial case for a rescission of the order granted by default and has a bona fide defence.

[31] Accordingly, the following order is made:

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[2] 2003 (6) SA 1 (SCA) at 9D-F.
[3] Bakoven Ltd v G J Howes Pt Ltd 1992 (2) SA 466 (E) at 471E— F; Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz 1996 (4) SA 411 (C) at 417B - I; Kili v Msindwana in Re: Msindwana v Kili [2001] SA 339 (Tk) at 345.
[4] 2016 (2) SA 184 GP at para 11.
[5] 1963 (1) SA 791 (W) at p794.

The application for rescission of judgment is granted with costs.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 02 October 2023

Date of Judgment: 14 August 2024

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 14 August 2024.